STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 9, 2006
v	No. 259296 Oakland Circuit Court
DAVID RICHARD COMMAND, Defendant-Appellant.	LC No. 04-194900-FC

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b.[1] Defendant was sentenced, as a second habitual offender, MCL 769.10, to 106 months to twenty years' imprisonment for this conviction. As the trial court improperly excluded relevant, exculpatory evidence in violation of defendant's Sixth Amendment right to confront the witnesses against him, we reverse defendant's conviction and sentence and remand for a new trial consistent with this opinion.

Defendant's conviction was based on the alleged sexual assault of a 19-year-old, intoxicated young woman in the early morning hours of December 19, 2003. On that evening, defendant visited a friend, Dylan Babcock, at the apartment he shared with Rebecca Walding, Christina Taylor, and the complainant. The complainant admitted that she willingly drank to the point of intoxication with defendant and the others that night. But, the complainant alleged that defendant forcibly penetrated her vagina after she had fallen asleep. Defendant, on the other hand, contended that he and the complainant engaged in consensual sexual contact, but that he never penetrated her.

[1] Defendant's conviction was based on alternate theories that he either used physical force or coercion to effectuate penetration and caused physical injury, MCL 750.520b(1)(f), or he caused physical injury to a victim whom he "[knew] or [had] reason to know . . . [was] mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520b(1)(g).

I. Exculpatory DNA Evidence

Defendant first argues that the trial court improperly excluded evidence that semen from someone other than defendant was found in the complainant's underwear only 14 hours after the alleged assault. We agree. The trial court excluded this evidence as an irrelevant instance of the complainant's past sexual activity under the rape-shield statute, MCL 750.520j. We review a trial court's decision to exclude evidence under the rape-shield statute for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

MCL 750.520j provides:

> (1) *Evidence of specific instances of the victim's sexual conduct*, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct *shall not be admitted* under sections 520b to 520g *unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value*:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity *showing the source or origin of semen*, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). [Emphasis added.]

The rape-shield statute and MRE 404(a)(3) represent "a policy determination that sexual conduct or reputation as *evidence of character* and *for impeachment*, while perhaps logically relevant, is not legally relevant." *People v Hackett*, 421 Mich 338, 346; 365 NW2d 120 (1984) (emphasis added). The rape-shield statute further represents "the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury." *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). Prohibiting a defendant from questioning a victim in this manner also encourages the reporting and prosecution of sexual offenses, and protects legitimate expectations of privacy. *Id*. at 10. But the arbitrary application of the statute may interfere with a defendant's Sixth Amendment right to confront the witnesses against him. *Adair*, *supra* at 485; *Hackett*, *supra* at 348. This is because "[t]o the extent that [the rape-shield statute] operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished." *Michigan v Lucas*, 500 US 145; 111 S Ct 1746; 114 L Ed 2d 205 (1991). "The right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Id*. at 149, quoting *Rock v Arkansas*, 483 US 44, 55; 107 S Ct 2704; 97 L Ed 2d 37 (1987). Thus, although

the purposes of the rape-shield statute favor exclusion of evidence coming within its terms, a trial court must determine the relevance of proffered evidence, its materiality, possible unfair prejudice, and the defendant's constitutional right to use the evidence on a case-by-case basis. *Adair*, *supra* at 484-485; *Hackett*, *supra* at 349.

We hold that under the particular facts and circumstances of this case that the trial court abused its discretion in applying the rape-shield statute to exclude exculpatory DNA evidence. Notwithstanding that testimony regarding the DNA of semen found on the complainant's underwear would be "[e]vidence of [a] specific instance[] of the victim's sexual conduct," the statue plainly permits evidence "showing the source or origin of semen," provided it is "material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1)(b). We conclude that the trial court erred by ruling irrelevant DNA evidence proving that the semen on the complainant's underwear emanated from another man. Rather, such evidence was "material to a fact at issue in the case," whether someone other than defendant caused complainant's vaginal injuries.

We conclude that the proffered DNA evidence was highly relevant. "It is well settled that where the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to meet that evidence with proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition." *People v Mikula*, 84 Mich App 108, 114; 269 NW2d 195 (1978). Further, "once the prosecution introduce[s] medical evidence to establish penetration, evidence of alternative sources of penetration [becomes] highly relevant to material issues in dispute." *People v Haley*, 153 Mich App 400, 405; 395 NW2d 60 (1986). In both *Haley* and *Mikula*, the prosecution presented expert testimony regarding the physical condition of the alleged victims as evidence to establish penetration - - a necessary element of the offense of first-degree CSC. *Haley*, *supra* at 404-405; *Mikula*, *supra* at 112-113, n 5. In each case, although the trial court relied on the rape-shield statute and prevented the defendant from introducing evidence to rebut the inference that he was the individual who had penetrated the victim, this Court subsequently determined that the rape-shield statute did not preclude the admission of the proffered evidence to rebut the inference that the respective defendants caused the complainants' physical condition by sexual penetration. *Id. Haley supra* at 405; *Mikula*, *supra* at 115.

Here, the prosecution presented the testimony of a sexual assault nurse examiner to establish that the complainant had been forcibly penetrated causing physical injury, an element of the charged offense. Contrary to the trial court's assertions, defendant did not merely argue consent in his defense. Defendant asserted that he and the complainant engaged in consensual sexual contact. But defendant consistently denied that he ever penetrated the complainant. Consequently, evidence that another man's semen was found in the complainant's underwear was highly relevant to the source of the complainant's injuries. *Haley*, *supra* at 405. Moreover, the danger of unfair prejudice to the prosecution did not outweigh the probative value of this evidence. MRE 403; MCL 750.520j(1).

The semen was found only 14 hours after the alleged assault. The only evidence the prosecution presented of penetration was the testimony of the complainant who was intoxicated and either unconscious or semi-conscious at the time, and that of the nurse examiner. The nurse testified that she used "tooling blue dye" on the complainant's vagina in areas that she said were

tender. The dye allows one to observe abrasions that are not otherwise visible. In *Haley*, like the case at bar, the "defendant did not seek to introduce [the proffered] evidence . . . for the purpose of showing consent or for general impeachment purposes but for the express purpose of rebutting the prosecution's evidence regarding sexual penetration and the inference that defendant was the person responsible." *Id*. We hold that rather than being similar to the marginally probative character or impeachment evidence the rape-shield statute was designed to exclude, *Hackett*, *supra* at 346; *Arenda*, *supra* at 10, the proffered evidence here is specifically allowed by the statute, MCL 750.520j(1)(b), and was highly relevant to a material issue, *Haley*, *supra* at 405. The DNA evidence is neither inflammatory nor so unfairly prejudicial to the prosecution as to outweigh its high probative value. MRE 403; MCL 750.520j(1).

We also conclude that the DNA evidence should not have been excluded because of defendant's failure to comply with the notice provision of the statute. MCL 750.520j(2). Our Supreme Court has determined that an in camera hearing will best accomplish the balancing of the interests further by the rape-shield statute and a defendant's right to a fair trial. "A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial." *Hackett*, *supra* at 350. Here, defendant was denied the opportunity to make a proper offer of proof and provide the required notice under the rape-shield statute because the prosecution failed to timely complete the DNA testing of samples the complainant and defendant provided. Genetic testing was not completed until the eve of trial. Accordingly, the prosecution did not provide defendant with a copy of the lab report until the start of trial. When no notice is given, the trial court must still determine whether the defendant's right of confrontation would be violated by the exclusion of the evidence. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302; 484 NW2d 685 (1992). The purpose of the notice provision is to protect the prosecution from surprise. *Id.* at 302. In this case, however, the prosecution caused the surprise.

Additionally, a defendant's right to due process of law is implicated by the application of a rule that would exclude relevant, exculpatory evidence. See *People v Stanaway*, 446 Mich 643, 662-680; 521 NW2d 557 (1994). Indeed, "[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment. *Id*. at 666, citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See, also, *People v Barrera*, 451 Mich 261, 269, 279, 290; 547 NW2d 280 (1996) (a defendant has a constitutional due process right to present exculpatory evidence). We conclude that in this case it would be an abuse discretion to exclude the exculpatory DNA evidence on the basis of the rape-shield statute's notice provision.

II. Prior Bad Act Evidence

Defendant also challenges the admission of evidence that he had previously committed a non-consensual sexual penetration of a prior complainant when defendant was 16 years old. The prosecution supported the admission of this evidence under MRE 404(b)(1), to establish a common scheme or plan of committing an act. In 1998, defendant allegedly assaulted the then 16-year-old complainant without her consent while she was intoxicated and either unconscious or semi-unconscious.

The prosecution argues defendant waived this issue by failing to provide this Court with a transcript of the trial court's pretrial ruling on this issue. MCR 7.210(B). We disagree. Generally, an appellant waives review of an issue by failing to furnish a transcript of the trial court's decision or otherwise provide a record for appellate review. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). In essence, there is no record to review. *Id*. So, when an appeal is taken on an evidentiary objection, "an appellate court is unable to review the party's objection and the trial court's reason for the decision." *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). But in this case the record is readily apparent that the prosecutor sought and the trial court admitted the evidence of the prior incident under MRE 404(b)(1) to show defendant's alleged "scheme, plan, or system in doing an act." Moreover, the trial transcript provides an abundant record to support a factual basis for defendant's claim that the trial court abused its discretion. The prosecution presented only four witnesses to establish the elements of the current offense, but six witnesses to show that the prior incident had occurred.

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But whether a rule of evidence or statute precludes the admission of evidence presents a question of law this Court reviews de novo. *Id*. An abuse of discretion occurs when a trial court admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278, 290; 662 NW2d 12 (2003). Even if preserved, nonconstitutional evidentiary error will not merit reversal unless, after an examination of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *Lukity*, *supra* at 495-497.

Generally, all relevant evidence is admissible, irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence of a person's character or a trait of character is an exception; such evidence is generally inadmissible to prove action in conformity with the trait of character. *Id*. at 494; MRE 404. Thus, as a general rule, evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). But such evidence may be admitted under MRE 404(b)(1) to show "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. . . ." To be admissible under MRE 404(b)(1), other acts evidence: (1) must be offered for a proper purpose, i.e., to prove something other than a character or propensity theory; (2) must be relevant under MRE 402, as enforced through MRE 104(b); and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). "Finally, the trial court, upon request, may provide a limiting instruction under Rule 105." *Id*. at 75. When assessing whether evidence is offered for a proper purpose under MRE 404(b), a court may not rely on a "mechanical recitation" of the rule's enumerated proper purposes; the prosecution must explain "how the evidence relates to the recited purposes." *Crawford*, *supra* at 387. "In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else." *Id*. at 388.

The prosecutor used the other acts evidence here to argue that defendant was a "niche" rapist. In opening statement, the prosecutor asserted that defendant, "despite his small size, is a

perfectly capable rapist. He finds the victim that fits into a particular niche, his kind of victim." In closing argument, the prosecutor continued, asserting that, "defendant has a niche, a place, he has a plan; a way of doing an act. . . . He finds young girls drunk, incapacitated, or physically helpless, takes them someplace,[2] puts them on their back, takes their pants off, he has intercourse with them, uses force to achieve that intercourse." Although the prosecutor repeatedly argued the prior incident showed defendant's scheme or plan, this argument is belied by the prosecutor's rebuttal closing argument that, like the first complainant, the complainant in this case was defendant's "perfect victim." In that regard, the prosecutor argued:

> [The complainant's] drunk, she's so drunk she doesn't know what she's doing. And [defendant] gets more and more excited. And the thought of [the complainant]. He's there with her on the balcony smoking, he's talking to her, showing her pictures of his baby, he's drunk, he sees her get drunker and drunker and drunker, and his vision is narrower, and narrower, and narrower. And then there she is, she is laying in the bed, he has her.
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> Did he think through it? No. Did he think about what he was going to say afterwards? No. Did he think how he was going to escape? No. All he thought about was to rape her . . . .

The prosecution argued in the trial court and on appeal that the prior offense and the instant offense were sufficiently similar to be relevant and admissible to show that defendant perpetrated both by means of a common "scheme, plan, or system in doing an act." We disagree. In both cases, the complainants alleged that defendant took advantage of them while they were too intoxicated to consent. In both cases, the complainants further alleged that defendant resorted to force when they fought back. Defendant also allegedly stripped both young women from the waist down to accomplish the assault. But in each case the complainants intoxicated themselves, and the encounter with defendant was a chance meeting at the residence of mutual acquaintances. The evidence does not show planning or scheming by defendant, nor does it show that he employed any "system" other than committing the elements of the offense.[3] Likewise, the removal of lower clothing from an intoxicated woman to perpetrate sexual penetration hardly qualifies as a plan, scheme or system. The other evidence here only showed a weakness of defendant's character; a propensity to take advantage of intoxicated women when the opportunity to do so might by chance occur. In short, the other acts evidence was used here as prohibited propensity evidence. "Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *Knox, supra* at 510.

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[2] Only in the 1998 incident does the evidence support such a claim. In that incident, the complainant and defendant went into a bathroom of the residence where they met, where the incident occurred. In this case, the complainant fell asleep or passed out on her bed, and later awoke when defendant was penetrating her.

[3] See n 1, *supra*.

In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court reviewed the use of other acts evidence for the purpose of showing scheme, plan, or system. The Court noted that Michigan, unlike some other jurisdictions, has "never adopted the so-called "lustful disposition" rule, which allows the use of other acts for propensity purposes in sex offense cases." *Id*. at 60-61. Nevertheless, where a sex offense is charged, other acts evidence is not limited to establishing identity; rather, "evidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Id*. at 62. The Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id*. at 63. But more than similarity between the charged and uncharged acts is necessary to establish the existence of a scheme, plan, or system. *Id*. at 64. Thus, there must not merely be a similarity in the results, "but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" *Id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in Wigmore). "'To establish the existence of a common design or plan, the common features must indicate *the existence of a plan rather than a series of similar spontaneous acts*, but the plan thus revealed need not be distinctive or unusual.'" *Sabin, supra* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 402; 867 P2d 757 (1994) (emphasis added).

Applying these principles to the case at bar, we conclude that the trial court abused its discretion by finding a reasonable inference of a common scheme, plan or system from admittedly two similar series of chance occurrences. Although in each case, it is possible to infer defendant took advantage of intoxicated women when the opportunity presented itself, it was not on the basis of defendant's planning, scheming, or employing a system. Rather, as the prosecutor argued to the jury, the evidence showed that defendant had a character flaw he could not resist. Thus, we conclude the other acts evidence here was inadmissible character evidence used as improper propensity evidence. MRE 404(a); *Knox, supra* at 510.

Although the trial court twice gave the jury detailed limiting instructions regarding the use of the other acts evidence,[4] we also conclude that this evidentiary error merits reversal because, after an examination of the entire record, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *Lukity, supra* at 495-497. "[T]he problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can 'weigh too much with the jury and . . . so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *Crawford, supra* at 384, quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997).

[4] Contrary to defendant's assertion, the trial court did not incorrectly instruct the jury that it may consider prior bad acts evidence to show that the defendant is a bad person. Rather, the challenged instruction merely represents a typographical error, which the court reporter subsequently corrected.

III. Excited Utterance

Finally, defendant contends that the trial court improperly allowed the prosecution to elicit testimony, over his objection, from the complainant's roommate regarding the complainant's post-incident statements. We disagree. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *Lukity, supra* at 488. When a trial court's decision regarding the admission of evidence involves a preliminary question of law, we review the issue de novo. *Id.* "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id.* at 495-496.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c) Hearsay evidence is inadmissible unless otherwise provided in the rules of evidence. MRE 802. Pursuant to MRE 803(2), an "excited utterance" is such an exception to the exclusionary hearsay rule. An "excited utterance" is defined by the rule as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2).

> There are two primary requirements for an excited utterance: (1) there must be a startling event, and (2) the resulting statement must have been made while the declarant was under the excitement caused by that event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).
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> There is no express time limit for excited utterances. The rule focuses on the lack of capacity to fabricate, not the lack of time to fabricate. Although the amount of time that passes between the event and the statement is an important factor in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. The question is not strictly one of time, but of the possibility of conscious reflection. *Id.* at 551. The trial court's decision regarding whether the declarant was still under the stress of the event is given wide discretion. *Id.* at 552. [*People v Walker*, 265 Mich App 530, 534; 697 NW2d 159 (2005), lv gtd on other issues 472 Mich 928; 697 NW2d 527 (2005) and held in abeyance ___ Mich ___; 705 NW2d 687 (2005).]

The complainant's roommate, Christina Taylor, testified regarding the conversation she had with the complainant in the early evening of December 9, 2003, approximately 12 to 14 hours after the alleged sexual assault occurred. Taylor testified that, at that time, the complainant told her that "what had happened was what she said the night before." Defendant had not objected, however, when the prosecution elicited testimony from Ms. Taylor that, immediately after the alleged sexual assault occurred, the complainant told her that she "woke up and he was inside of me."

The complainant's statement immediately following the alleged assault was clearly an excited utterance.[5] Regardless of whether her later statement was an excited utterance, its admission was not outcome determinative. The later statement merely referenced the complainant's first statement. As the first statement, which actually did inculpate the defendant of the charged offense, was already before the jury, the further admission of the challenged statement would have no further effect on the outcome of defendant's trial. *Lukity, supra* at 495-496.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Stephen L. Borrello

[5] Even defendant conceded that the complainant was crying and upset following this incident (although he believed she was upset because she had been caught being unfaithful to her boyfriend).